85-767

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

I. Are attorney's fees recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, by prevailing parties for representation in a federal administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, which fees are not for time expended on a judicial proceeding in court?

II. Does the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, give prevailing parties in an administrative proceeding under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d, a right to bring an independent civil action to recover attorney fees?

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*Rule 28.1 is not applicable in this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

The North Carolina Department of Transportation, North Carolina Board of Transportation, and James E. Harrington, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Fourth Circuit Court of Appeals entered August 15, 1985 entitled Crest Street Community Council, Inc., Residents of Crest Street Community, and Save Our Church Committee, Appellants, v. North Carolina Department of Transportation, North Carolina Board of Transportation, and James E. Harrington, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation, Appellees, No. 85-1008.

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REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, of which review is sought, is published but has not yet been reported. A copy thereof is printed in the Appendix attached hereto, *infra,* page App. 1. The opinion of the United States District Court for the Middle District of North Carolina, which was reversed by the Fourth Circuit Court of Appeals, is published and reported in 598 F. Supp. 258 (1984). A copy thereof is printed in the Appendix attached hereto, *infra,* page App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, of which review is sought by this petition, was entered on August 15, 1985. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

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STATUTE INVOLVED

The statute involved is The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides in relevant part:

> "In any action or proceeding to enforce the provisions of Sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

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STATEMENT OF THE CASE

Respondents, civic organizations representing the interests of the Crest Street community, a stable, cohesive black neighborhood in western Durham, North Carolina, commenced this civil action on November 30, 1983, in the United States District Court for the Middle District of North Carolina, Durham Division, to recover attorneys' fees and other expenses, under The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, for representation (i) in an "administrative proceedings" to enforce

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, as provided by 49 C.F.R. PART 21, and (ii) in a motion to intervene in *ECOS, et al v. Brinegar, et al,* No. C-352-D-72(MDNC), and leave to file a complaint therein to enforce Title VI and other statutes. In September, 1978, Respondents filed an administrative complaint with the Secretary of the United States Department of Transportation (USDOT), alleging that the North Carolina Department of Transportation (NCDOT) in its planning for the construction of the East-West Expressway through the Crest Street community was in violation of Title VI and 49 C.F.R. § 21.7(d), and other statutes governing eligibility for federal-aid to State highway construction. The Secretary treated the complaint as one made under 49 C.F.R. § 21.11(b) and conducted an investigation under 49 C.F.R. § 21.11(c). As a result of the investigation, the USDOT Office of Civil Rights informed the Secretary of NCDOT of its preliminary conclusion and judgment that the alignment of the highway and interchange in the Crest Street community as proposed in the Draft Environmental Impact Statement "would constitute a prima facie violation of Title VI, and, in particular Section 21.5(b)(3)" of 49 C.F.R. Thereafter Respondents, representatives of NCDOT and the City of Durham, and others entered into discussions and negotiations and resolved the dispute by informal means as provided by 49 C.F.R. 21.11(d)(1). No procedure for effecting compliance under 49 C.F.R. § 21.13 was initiated. Agreement in principle to resolve the dispute by compressing the highway and its interchange, and relocating the community as a whole to an adjacent site by the use of a combination of State, federal and local programs was reached and incorporated into the Final Environmental Impact Statement.

On February 20, 1973, further construction of the East-West Expressway was enjoined in the *ECOS* case pending compliance with public hearing requirements of 23 U.S.C. § 128 and preparation and filing of a Final Environmental Impact/Section 4f Statement in compliance with 42 U.S.C. § 4332(1)(C) and 49 U.S.C. § 1653(f). Following preparation and filing of the Final Environmental Impact Statement, NCDOT moved in the *ECOS* case for dissolution of the injunction. Thereafter, Respondents Crest Street Community Council, Inc., and an individual moved to intervene as parties plaintiffs, and to file a complaint alleging violation of Title VI and other laws. Two months later, the *ECOS* action was concluded by consent judgment dissolving the injunction and dismissing the action. Respondent Crest Street Community Council, Inc., and the individual were not allowed to intervene. The next day after the consent judgment was entered, The Crest Street Community Council, Inc., NCDOT and the City of Durham formally executed agreements embodying in detail the agreements reached earlier in principle.

During the discussions and negotiations leading up to resolution of the dispute, the Respondents and NCDOT put aside the issue of liability for attorney fees under 42 U.S.C. § 1988. The formal agreements and the consent judgment reserved any rights Respondents may have to recover attorney fees under the statute.

On cross motions for summary judgment, the district court dismissed Respondents' action. The United States Court of Appeals for the Fourth Circuit reversed the judgment of the district court and remanded for determination of a reasonable fee.

ARGUMENT

A prevailing litigant is not entitled to recover attorney fees from his adversary except as authorized by statute. *Aleyeska Pipeline Service Company v. The Wilderness Society,* 421 U.S. 240 (1975). The decisions of the federal courts of appeal are in conflict as to whether attorney fees are recoverable under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. Section 1988, for time spent in federal administrative proceedings under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d. The decision of the Court of Appeals for the Fourth Circuit in this case adds to the conflict.

Under the rationale of *Blow v. Lascaris,* 668 F.2d 670 (2nd Cir. 1982) cert. denied, 459 U.S. 914 (1982); *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3rd Cir. 1983); *Redd v. Lambert,* 674 F.2d 1032 (5th Cir. 1982); *Webb v. County Board of Education,* 715 F.2d. 254 (6th Cir. 1983) affirmed 471 U.S. —, 85 L.Ed.2d. 233, 105 S.Ct. 1923 (1985); *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983); *Garcia v. Ingram,* 729 F.2d. 691 (10th Cir. 1984); Section 1988 does not authorize the recovery of attorney fees in this case.

Although the term "action or proceeding" is ambiguous and the word "proceeding" is broad enough to include an administrative proceeding, the opinions in *Blow v. Lascaris, supra,* at 671, *Latino Project, Inc. v. City of Camden, supra,* at 264 and *Horacek v. Thone, supra,* at 500, construe the words of the statute to mean a proceeding or action in a court, and not an administrative proceeding, was intended.

The opinions in *Blow v. Lascaris, supra,* at 671; *Latino Project, Inc. v. City of Camden, supra,* at 264, *Horacek*

v. Thone, supra, at 449 and 450; and *Webb v. Board of Education, supra,* at 258 and 259, construe the legislative history to mean a proceeding or action in a court, and not an administrative proceeding, was intended. The legislative history does not discuss administrative proceedings but rather speaks in terms of "court", "in suits", "in court", "through the courts", "in these cases", and "court action".

The opinions in *Redd v. Lambert, supra,* at 1036, *Horacek v. Thone, supra,* at 499, *Latino Project, Inc. v. City of Camden, supra,* at 264 and 265, and *Webb v. Board of Education, supra,* at 256, decline to follow the decision under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. Section 2000e-5(k) in *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980) and have distinguished *Carey* on the grounds that the enforcement scheme of Title VII includes mandatory prior state administrative and court proceedings while the enforcement schemes of the statutes listed in Section 1988 do not. Furthermore, there is no congressional policy requiring exhaustion of administrative remedies under the statutes listed in Section 1988 as there is in Title VII. *Webb v. Board of Education, supra,* at 257. The reasons for construing that Congress intended "proceedings" to include administrative proceedings in *Carey* do not exist under Title VI and Section 1988.

In the opinion in this case, the Court of Appeals for the Fourth Circuit construed the statutory language of Section 1988 to mean that Congress intended to award fees for both civil actions and administrative proceedings under Title VI. Appendix, *infra,* page App. 9. It interpreted the legislative history as being consistent with an interpretation that Congress intended to award fees for administrative proceedings as well as civil actions under Title VI, Appendix, *infra,* page App. 13. Finally, it interpreted *Carey* to support the award of fees for administrative proceedings under Title VI. The opinion recognizes that it may be in conflict with *Latino Propect, Inc. v. City of Camden, Inc., supra,* doubts its correctness, and attempts to distinguish it on the basis that no civil action to enforce Title VI was filed whereas in this case Respondents executed a consent judgment albeit as "Applicants for Intervention", Appendix, *infra,* page App. 14. On the other hand, the opinion asserts Title VI may only be enforceable by administrative proceeding. Appendix, *infra,* page App. 13.

The rationale of the opinions in *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982), *Lampher v. Zagel,* — F.2d — (7th Cir. 1985) and *N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d. 1161 (3d Cir. 1982) is consistent with the opinion of the Court of Appeals for the Fourth Circuit in this case.

The petition for writ of certiorari in this case should be granted to resolve the conflicts in the circuit courts of appeal.

The opinion of the Court of Appeals in this case appears to be in conflict with the rationale of the decision of the Supreme Court in *Webb v. Board of Education of Dyer County,* 471 U.S. —, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985). Certiorari was granted in *Webb* to resolve an apparent conflict in federal authority on the availability of attorney fees under Section 1988 for time spent in state administrative proceedings prior to the filing of a federal civil rights action, citing in footnote 11 the same conflict-

ing decisions noted above, including *Latino Project* which involved a federal administrative proceeding under Title VI. The same rationale for recovery of attorney fees under Section 1988 for time spent in state administrative proceedings should apply to federal administrative proceedings under the statutes listed in Section 1988.

Although *Webb* does not construe the language of Section 1988 to mean administrative proceedings were not intended, it does appear to construe the legislative history as intending court actions rather than administrative proceedings and distinguishes *Carey* on the same reasoning used in *Redd v. Lambert, supra,* at 1036, *Horacek v. Thone, supra,* at 264 and 265, and *Webb v. Board of Education, supra,* at 256.

For this apparent conflict with the decision in *Webb,* and to resolve the important issue presented by this question, the petition should be granted.

Section 1988 does not create an independent cause of action to recover attorney fees. *Horacek v. Thone, supra,* 499; *Estes v. Tuscaloosa County,* 696 F.2d. 898, 901 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons in accordance with Rule 17 of the Rules of the Supreme Court, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1008

Crest Street Community Council, Inc.;
Residents of Crest Street Community;
Save Our Church & Community Committee,

Appellants,

versus

North Carolina Department of Transportation;
North Carolina Board of Transportation;
James E. Harrington, Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Hiram H. Ward, Chief District Judge. (CA 83-1239-D)

Argued: June 7, 1985 Decided: August 15, 1985

Before WINTER, Chief Judge, and WIDENER and CHAPMAN, Circuit Judges.

Michael D. Calhoun (North Central Legal Assistance Program on brief) for Appellants; James B. Richmond, Special Deputy Attorney General (Lacy H. Thornburg, Attorney General on brief) for Appellees.

WINTER, Chief Judge:

The prevailing parties in a federal administrative action involving Title VI of the Civil Rights Act of 1964

sought to recover attorney's fees under 42 U.S.C. § 1988 in an independent action in federal district court. The district court denied their request. We reverse.

I.

Plaintiffs represent residents of Crest Street community, a well-established, predominantly black neighborhood in Durham, North Carolina.[1] Prior to late 1976, the City of Durham had requested, and defendant North Carolina Department of Transportation (NCDOT) had planned, extension of the East-West Freeway through the Crest Street community. The proposed extension was a federal-aid highway project, with approximately 75% of its costs to be paid by federal funds. The proposed highway extension would have destroyed much of the community, including its church and park, and would have splintered the remainder into isolated sectors likely to undergo commercial development. The lengthy planning period for construction of the freeway discouraged public and private development and maintenance in the Crest Street community for many years.

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1. Plaintiffs Residents of Crest Street Community and Save Our Church and Community Committee are unincorporated associations whose members are residents of the Crest Street area and members of the New Bethel Baptist Church. The former was organized in 1976 for civic improvement purposes, and the latter was formed in 1977 as a subcommittee or agent of the former for the purpose of opposing the freeway extension. Plaintiff Crest Street Community Council, Inc. was incorporated in February of 1980 to assume the functions of the other two plaintiffs, including conducting the negotiations surrounding the previously-filed administrative complaint. For our purposes the three groups may be treated as one, and most further references will be simply to "plaintiffs."

NCDOT's plans for the extension remained dormant for several years, but active planning resumed in 1976. In March 1977, plaintiffs retained the North Central Legal Assistance Program as counsel to represent them concerning the defendants' planning and constructing of the freeway and remedial efforts to mitigate the adverse impact of the project. During 1977 and 1978, the residents and organizations of the Crest Street community expressed their opposition to construction of the freeway through the Crest Street community, but defendants proceeded with issuing a revised draft Environmental Impact Statement for the project.

Plaintiffs responded to defendants' new plans and revised Environmental Impact Statement by filing an administrative complaint in September 1978 with the United States Department of Transportation (DOT), as authorized by 49 C.F.R. § 21.11(b) (1977). Plaintiffs sought an investigation of whether NCDOT's practices complied with Title VI of the Civil Rights Act of 1964 and other federal laws.[2] The administrative complaint sought prohibition of further planning or construction of the freeway and rejection of NCDOT's Environmental Impact Statement until the freeway project was brought into compliance with applicable laws.

As required by its regulations, 49 C.F.R. § 21.11(c), DOT investigated the freeway proposals and the allega-

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2. The administrative complaint challenged defendants' proposal under provisions of the National Environmental Policy Act, 42 U.S.C. § 4331, the Federal-Aid Highway Act, 23 U.S.C. § 109, Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. § 3601, and various implementing regulations, as well as under Title VI.

tions of the administrative complaint. On February 20, 1980, after the field investigation, the DOT Director of the Office of Civil Rights informed NCDOT of DOT's preliminary finding of reasonable cause to believe that construction according to the NCDOT proposal would constitute a prima facie violation of Title VI and of DOT's implementing regulations, particularly 49 C.F.R. § 21.5 (b)(3).[3] The parties then took the next step in DOT's Title VI compliance process and began extensive negotiations to resolve their differences through "voluntary means."[4] Representatives from DOT, the Federal Highway Administration, and the City of Durham, as well as defendants, plaintiffs, and other opponents of the freeway, participated in these negotiations. In February 1982,

3. That section provides:

> In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, deny them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

4. Title VI directs that "no such action [cutting off funding] shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. DOT's regulations similarly provide that "[i]f an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible." 49 C.F.R. § 21.11(d)(1) (1984). Formal agency action is to be avoided unless the "threatened noncompliance cannot be corrected by informal means." 49 C.F.R. § 21.13(a) (1984).

plaintiffs, the City of Durham, and NCDOT reached a preliminary agreement for the freeway design, relocation assistance benefits, and other assistance in mitigation of the adverse impact of the project, but negotiations continued on a final assistance plan and ultimate resolution of all issues raised by the administrative complaint.

In August 1982, NCDOT moved to dissolve a 1973 order which had been entered in ECOS, Inc. v. Brinegar, No. C-352-D-72 (M.D.N.C.), enjoining construction of the freeway.[5] Plaintiffs and Willie Patterson, a resident of the Crest Street community, filed a proposed complaint and moved to intervene in the *ECOS* action on October 15, 1982. Their obvious purpose was to contest dissolution of the injunction until their interests were fully protected. While this motion for intervention was pending, the parties concluded their negotiations and prepared the Final Mitigation Plan, and the City of Durham and NCDOT prepared a complementary Municipal Agreement that accompanied the Final Mitigation Plan. The district court never formally ruled on the motion to intervene, but the applicants

5. Plaintiffs in the *ECOS* action were ECOS, Inc. (a nonprofit, educational, ecological corporation), an association of Duke University students and some of its members, and two Durham residents. The defendants were state and federal transportation officials and a construction company. The action had alleged violations of the public hearing requirement and the preservation of parking requirements of the Federal-Aid Highway Act, 24 U.S.C. §§ 128, 138, the parkland preservation policy of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332. The order enjoined steps toward construction of a section of the proposed freeway including that through the Crest Street area until the defendants achieved full compliance with the statutes allegedly violated.

for intervention were parties to a December 14, 1982 Consent Judgment dissolving the injunction and dismissing the *ECOS* action.[6] On the following day, Plaintiffs, NCDOT, and the City of Durham executed the Final Mitigation Plan in a public ceremony.

The Final Mitigation Plan recites that the Crest Street Community Council, Inc. "agreed to withdraw its administrative complaint if the City and NCDOT agreed to implement these mitigation efforts," and that plaintiffs agreed to support dissolution of the injunction in the *ECOS* case. In return for allowing construction of the freeway extension to proceed, plaintiffs were accorded substantial relief under the terms of the Plan. The Plan sets out in a comprehensive fashion steps that the City and NCDOT agreed to take to mitigate the detrimental impact of the freeway on the Crest Street community. The defendants moved the proposed highway right-of-way and modified an interchange so as to preserve the community church and park. Plaintiffs state that defendants esti-

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6. The Consent Judgment provided, *inter alia*, that the state highway defendants and applicants for intervention had

> resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982. The plaintiffs and applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention and in addition reserve their claim for attorney fees against the State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

mated the cost of implementing their major direct responsibilities under the Plan to be $3,072,000, and as part of the settlement NCDOT released the City of Durham from its obligation to pay an estimated $2,750,000 towards right-of-way costs for the freeway. A new community site will be developed in the same area and will allow the residents to remain intact as a community, and the quality of the housing, streets, and recreational facilities in the new community will be much better than conditions in the existing community.

The Plan recited that the City and NCDOT denied any liability for plaintiffs' attorney's fees, and that plaintiffs preserved their right to claim such fees. In August 1983, plaintiffs' counsel sent defendants a detailed request for attorney's fees. NCDOT adhered to its position that it was not liable for such fees, and plaintiffs filed this action on November 30, 1983. The parties filed cross-motions for summary judgment, and on November 29, 1984, the district court granted defendants' motion and dismissed the action. 598 F. Supp. 258 (M.D.N.C. 1984).

The district court first separated the hours that plaintiffs' counsel worked into those connected with the administrative and the *ECOS* proceedings. It concluded that the 1,224.25 hours worked before the motion to intervene could not be attributed to the *ECOS* action because "to retroactively declare that efforts done over a five year period would have been required in the course of litigation later initiated would result in a highly speculative, uncertain, and unfairly surprising award of fees." *Id* at 263. The district court then held that § 1988 does not authorize an award of attorney's fees for administrative proceedings to enforce Title VI, and that plaintiffs could not recover

any fees incident to the *ECOS* litigation because they were not prevailing Title VI parties in that action. *Id* at 263-67. Plaintiffs appealed.

II.

The Civil Rights Attorney's Fees Awards Act of 1976 added the following sentence to 42 U.S.C. § 1988, which previously had no provision for such fees:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

We think that the wording of § 1988 explicitly covers plaintiffs' claim: They were "prevailing parties" in a "proceeding to enforce . . . title VI of the Civil Rights Act of 1964."

If we approach the statutory language in reverse order, the threshold requirement for this and other similar statutes is that the attorney's fees claimant be a "prevailing party, other than the United States." Defendants concede that plaintiffs gained substantial relief that was causally related to their administrative complaint and that plaintiffs therefore are "prevailing parties."[7]

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7. Although the precise amount and reasonableness of plaintiffs' requested fees will be subject to negotiations between the parties and if necessary to the district court's discretion, we see no reason categorically to exclude the time spent in preparng the motion to intervene or otherwise spent in the *ECOS* proceedings. *Cf.* Chrapliwy v. Uniroyal, 670 F.2d 760, 765-67 (7 Cir. 1982)

(Continued on following page)

The next statutory requirement is that the underlying legal complaint have been brought in an "action or proceeding to enforce a provision of" one of the listed laws. Defendants argue that plaintiffs' administrative complaint was not an "action or proceeding" within the meaning of § 1988. The natural or usual meaning of the words "action or proceeding" connotes "civil" action and "administrative" proceeding. Of course, "proceeding" alone may be read broadly enough to include "civil" action. We see no reason to depart from those meanings here. Some of the substantive provisions listed in § 1988 explicitly contemplate civil actions in state or federal court, and some, such as Title VI, explicitly contemplate initial administrative proceedings with possible later judicial review. *E.g.*, 42 U.S.C. §§ 2000d-1, 2000d-2. We think that the disjunctive use of both terms indicates on the face of the statute Congress' intent to award fees for both avenues of legal redress to challenged action.

Title VII contains a nearly identical fee provision,[8] and the Supreme Court has repeatedly noted that "the

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(Continued from previous page)

(Title VII plaintiff may recover attorney's fees for optional, collateral federal administrative proceeding that aided ultimate settlement of dispute), *cert. denied*, 461 U.S. 956 (1983). Plaintiffs' participation in the *ECOS* action was part of their overall strategy, and whether or not it alone was a catalyst to the relief they obtained, the facts and plaintiffs' theories in the *ECOS* action were intimately connected with their administrative complaint.

8. In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5(k).

provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964," and that "the legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n.7, (1983) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)). In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), the Court addressed the same interpretation argument that defendants make here and held that Title VII does authorize a fee award for work done in state administrative and judicial proceedings:

> The words of [the statute] leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. . . . It cannot be assumed that the words "or proceeding" in § 706(k) are mere surplusage.

447 U.S. at 61. We think that the same reasoning applies to § 1988. Moreover, Congress' expressed policy of uniformity among the fee statutes will be furthered by adopting the same construction of identical language.

Plaintiffs' "proceeding" before DOT meets the further qualification that it be "to enforce a provision of" one of the listed laws. Title VI is one of those listed

statutes, and plaintiffs' primary[9] claim in the administrative complaint was that the proposed highway extension would violate Title VI. Moreover, the purpose of the regulations under which plaintiffs filed their administrative complaint "is to effectuate the provisions of Title VI of the Civil Rights Act of 1964," 49 C.F.R. § 21.1, so we have no hesitancy in concluding that plaintiffs meet the literal terms of § 1988.

Defendants argue that we should make "no distinction whether the administrative proceeding in question is or is not to enforce Title VI but only whether it is mandatory." Thus, a mandatory proceeding would be an "action or proceeding" "to enforce a provision of" Title VI, but an optional proceeding would not fall within that same definition. Other courts have attributed some significance to the optional/mandatory distinction, but we are not persuaded that it should control for Title VI, and therefore we need not address the district court's conclusion, which both sides accept, that Title VI does not require exhaustion of administrative remedies. *See* 598 F. Supp. at 262 (citing Chowdhury v. Reading Hospital and Medical Center, 677 F.2d 317 (3 Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983)).

As we have said, the language of § 1988 provides broadly that "in *any* action *or proceeding to enforce a*

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9. Plaintiffs included several other claims, see note 2 *supra*, but the bulk of their discussion in the administrative complaint concerned racial discrimination. The Title VI claim is what generated DOT's investigation and preliminary finding of discrimination and what prevented defendants from proceeding with their plans. The record does not indicate what, if anything, became of plaintiffs' non-Title VI claims.

provision of . . . Title VI . . ., the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988 (emphasis added), and the scheme of Title VI confirms what the language of § 1988 suggests. The Department of Transportation regulations under which plaintiffs filed their administrative complaint were specifically established to enforce federal rights created by Title VI,[10] so we conclude as a matter of normal statutory interpretation that Congress meant to include them within § 1988's use of the term "proceeding." Moreover, Title VI does not explicitly authorize a private right of action,[11] but it does authorize judicial review of agency action taken to effectuate its purposes. 42 U.S.C. § 200d-2. The federal[12]

10. Title VI directed all federal agencies "to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. DOT did issue such regulations, which are titled in part "Effectuation of Title VI of the Civil Rights Act of 1964".

11. In Sumpter v. Harper, 683 F.2d 106, 109 n.4 (4 Cir. 1982), we rejected a specific private claim under Title VI but reserved "the broader question of whether *any* right of action is available to a private litigant under [Title VI]." (original emphasis). We similarly express no opinion on the latter issue.

12. The Court in *Carey* rejected the argument that "proceeding" under Title VII should be limited to *federal* administrative proceedings, but acknowledged that such an interpretation "at least would not render the words 'or proceeding' a complete nullity." 447 U.S. at 62. We do not adopt such an interpretation independently, but we recognize that as a practical matter our analysis may lead to that result under Title VI. That title applies to "any program or activity receiving Federal financial assistance," and, while it is certainly possible for the states to have administrative procedures that may be able to redress alleged violations of Title VI, those procedures are not mandated by Congress and presumably they can fare no better than the state-created procedures in *Webb*. *See* Section IV *infra*.

administrative proceedings for which plaintiffs seek compensation thus may be analogized to the mandatory state procedures in *Carey*: They are the primary and perhaps the only remedy for violation of that title.[13]

Since the meaning of § 1988 seems so clear on its face, resort to legislative history or policies is hardly required. We note, however, that they confirm our interpretation of § 1988. The legislative history of Title VI does contain numerous references to "suits," "courts," and "judicial process," but these are references only to the usual method of enforcing most of the civil rights statutes listed in § 1988. Certainly there is no affirmative indication that Congress meant to nullify the term "proceeding" that it used in § 1988. To the contrary, we believe that the expressed purposes "to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency in our civil rights laws," Senate Report, *supra* note 13, at 1, the explicit references to Title VII, *id.* at 2, 3, 4, and the renewed instruction to "the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws," *id.* at 3, all support our conclusion.

III.

So far as we are aware, only the Third Circuit has considered the precise question before us, i.e., the pro-

13. *Cf.* S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913 (hereinafter cited as "Senate Report") ("[T]he Committee has found that fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.").

priety of awarding attorney's fees under § 1988 for work done in connection with administrative proceedings to enforce Title VI. In NAACP v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1170-71 (3 Cir. 1982), *cert. denied,* 460 U.S. 1052 (1983), the Third Circuit held that prevailing plaintiffs could recover attorney's fees for work related to an administrative proceeding to which they were not parties but which was prompted by the litigation so long as that work contributed to their ultimate success. The court relied simply on the language of the statute and the Supreme Court's reasoning in *Carey.*

In Latino Project, Inc. v. City of Camden, 701 F.2d 262 (3 Cir. 1983), a different panel of the Third Circuit distinguished *Wilmington Medical Center* on the ground that plaintiffs in that case had initially filed a complaint in district court, while the plaintiffs in *Latino Project* had succeeded, if at all,[14] at the administrative level without ever filing suit in court. The *Latino Project* panel held that " a plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in [§ 1988] is not entitled to attorney's fees . . . .even though he may have obtained substantial relief in an administrative proceeding." *Id.* at 265. We respectively doubt the correctness of that holding,[15] but in

14. Plaintiffs in *Latino Project* challeneged a municipality's administration of block grant funds, and the HUD area supervisor concluded that the city had not discriminated in using those funds. Plaintiffs took no further legal action, other than seeking their attorney's fees in district court.

15. It is perhaps significant that the *Latino Project* panel began its "analysis of section 1988 by noting the ambiguity of the words *'civil* action or proceeding,' " *id.* at 263 (emphasis added). This was a misquotation of the language of § 1988, and *Latino Project* uniformly misquotes § 1988 by adding the word "civil" before "action or proceeding." It is possible that the correctness of the conclusion which we doubt is attributable to this initial and repeated error.

any event, ours is not that case. In the case before us, there was intervention in a case pending in court, and for all practical purposes, intervention was permitted.

IV.

Defendants contend that the reasoning in Webb v. Board of Education of Dyer County, 471 U.S. — , 85 L.Ed.2d 233, 105 S.Ct. 1923 (1985), and other non-Title VI cases compels a conclusion different from what the face of the statute indicates. We disagree. The petitioner in *Webb* was a black man who was fired from his position as a tenured public elementary school teacher. He obtained counsel and challenged his discharge at several hearings before the county board of education on the grounds that the discharge was racially motivated, that it violated his right to due process, and that it violated state laws governing teachers' dismissals. He was unsuccessful before the board, so he filed a complaint in federal district court, alleging that his rights under the Constitution and 42 U.S.C. §§ 1981, 1982, 1983, and 1985 had been violated. The parties settled the federal suit by agreeing that Webb would be reinstated and awarded $15,400 in damages. Upon litigation of the attorney's fees issue, the board conceded that Webb was a prevailing party, but it contended that the fee should be no more than $5,000, rather than the $21,165 requested. The district court ruled in Webb's favor on all issues except his claim for fees before the state tribunals, and it awarded a fee of $9,734.38 plus expenses.

Webb argued on appeal (1) that the school board hearings were "proceeding[s] to enforce a provision of [§ 1983]" within the meaning of § 1988, and (2) that the

time spent in those hearings was nevertheless compensable as reasonably spent in preparation for the court action. On the first point, the Court noted the similarity between § 706(k) of Title VII and § 1988, but it stated that "the reasoning in Carey is not applicable to this case," because § 1983 contains no exhaustion requirement, as Title VII does,[16] and because "the school board proceedings in this case simply do not have the same integral function under §1983 that state administrative proceedings have under Title VII." 85 L.Ed.2d at 240-41. The Court stated:

> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory.

Id. at 241 (footnotes omitted).

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16. The Court said:

> Carey, however, arose under a statute that expressly requires the claimant to pursue available state remedies before commencing proceedings in a federal forum. There is no comparable requirement in § 1983, and therefore the reasoning in Carey is not applicable to this case. . . .
>
> The difference between Carey and this case is that in Carey the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit.

85 L.Ed.2d at 240-41 (footnote omitted) (quoting Smith v. Robinson, 468 U.S. —, 104 S.Ct. 3457, 82 L.Ed.2d 746, 764 n.14 (1984)).

The Court in *Webb* then went on to consider petitioner's second theory—that even if there was no automatic entitlement for the time spent on the administrative proceedings, that time was reasonably expended in preparation for the later litigation. It emphasized that each case must be decided on its own facts, and that although some services performed before formally filing a lawsuit are compensable under § 1988, it was not error for the district court to exclude the five years of easily separable administrative time in computing a "reasonable attorney's fee" for Webb's counsel. *Id.* at 241-43.[17]

What we find most significant about *Webb* is not that it denied an increase in fees to a prevailing § 1983 plaintiff, but that it did so on a basis that did not categorically exclude administrative proceedings from § 1988. We deem this an indication that in an appropriate case such fees may be recoverable,[18] and we believe that *Webb's* reason-

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17. The Court concluded:

> "We reemphasize that the district court has discretion in determining the amount of a fee award." [Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)]. When such an award is appealed, the reviewing court must evaluate its reasonableness with appropriate deference. Considering the governing legal principles, the petitioner's burden of establishing his entitlement to the requested fee, and the evidence and arguments presented below, we conclude that the District Court's decision to deny any fees for time spent pursuing optional administrative remedies was well within the range of reasonable discretion.

85 L.Ed.2d at 243.

18. *See id.* at 243-49 (Brennan, J., concurring in part and dissenting in part) (Court's conclusion authorizes limited awards of fees under § 1988 for work performed in optional state administrative proceedings); Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 762 F.2d 272, 277 n.7 (3 Cir. 1985) ("[T]he Supreme Court recently held in *Webb* . . . that fees may be recovered under 42 U.S.C. § 1988 for time spent by counsel pursuing 'optional administrative proceedings,' . . . so long as counsel's work 'was both useful and of a type ordinarily necessary to advance the [civil rights] litigation' to the point where the party prevailed.").

ing further suggests this is such an appropriate case. In all three of the most pertinent Supreme Court cases—*Carey, Smith,* and *Webb*—the Court applied the attorney's fees statutes as written but examined the congressional enforcement scheme for the underlying rights involved to see if the particular proceedings for which fees were sought were part of those statutory schemes. The Court has concluded that certain state administrative proceedings do qualify under Title VII and that mandatory Education of the Handicapped Act and optional state tenure proceedings do not qualify under §§ 1983 and 1988. We believe that each provision listed in § 1988 must be examined separately, *cf.* Redd v. Lambert, 674 F.2d 1032, 1036-37 (5 Cir. 1982) (disallowing fees for plaintiff whose § 1983 claim was not decided by the state courts but carefully distinguishing 28 U.S.C. § 1341 from Title VII and *Carey* on the basis of § 1341's remedial scheme), and that the enforcement scheme of Title VI aligns it solidly with Title VII rather than with § 1983. Resort to optional administrative proceedings that are creatures of state law cannot be linked to the congressional enforcement scheme under § 1983, so there is no apparent basis to infer that Congress intended to include them within § 1988 when it drafted that statute. In contrast, mandatory state procedures under Title VII and certain federal procedures under Title VI are important parts of the statutory enforcement scheme. As we discussed above, the proceedings that plaintiffs initiated here certainly serve an "integral function," *Webb,* 85 L.Ed.2d at 241, under Title VI.

V.

Since we hold that plaintiffs' claim is explicitly covered by the language of § 1988, we consider next whether

they may bring an independent action in federal district court solely to recover fees for an administrative complaint that has already been settled. Section 1988 provides that "*the court,* in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," and DOT's regulations implementing Title VI contain no provision for awarding attorney's fees. Thus, it follows that plaintiffs *must* apply to a court for their fees.

There is authoritative support for our reading that prevailing Title VI plaintiffs may bring an independent action in federal court to recover attorney's fees. Title VI's enforcement scheme is similar to Title VII's in that they both rely heavily on administrative proceedings in the first instance. The Supreme Court stated in *Carey* that there were no insurmountable barriers to recognition of such an independent action under Title VII:

> We agree with the District Court that the availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complaintant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

447 U.S. at 65-66. We believe the same anomalous consequences would result here if we were to deny fees solely because plaintiffs resolved their dispute without court action, as Title VI and its implementing regulations encouraged them to do.

Some cases have stated that § 1988 does not create an independent cause of action, but the district court correctly distinguished these as having been decided before, or relying on reasoning that does not apply after, the 1976 amendment to § 1988 that added the attorney's fee provision at issue here. 598 F. Supp. at 262. The two cases defendants cite, Estes v. Tuscaloosa County, 696 F.2d 898 (11 Cir. 1983), and Horacek v. Thone, 710 F.2d 496 (8 Cir. 1983), may also be distinguished on the ground that the attorney's fees sought in those cases were incurred in state administrative proceedings that did not concern enforcement of the civil rights statutes. Section 1988 clearly does not apply and does not create an independent cause of action in such circumstances.

Even is some type of court action were required to trigger § 1988's fee provision, plaintiffs would still have a claim to fees by virtue of their proposed complaint and motion to intervene in the *ECOS* action. That motion was never formally granted or denied, but the defendants in that action recognized plaintiffs' status by including them in the consent settlement. Indeed, the fact that the consent judgment was not filed until the Final Mitigation Plan had been fully negotiated and only one day before the Plan's formal execution suggests that plaintiffs were the controlling force in final settlement of the *ECOS* action. Plaintiffs were in a comparable position to a plaintiff whose suit is settled after merely filing a complaint,[19] and we think such a party would also be considered sufficiently prevailing in a civil "action" to merit an award of attorney's fees.

VI.

To summarize, we hold that plaintiffs who prevailed on their Title VI claim at the administrative level may recover their attorney's fees and costs for work performed in connection with those proceedings[20] in an independent action in federal district court. Therefore, we reverse the judgment of the district court and remand for determination of a reasonable fee.

REVERSED AND REMANDED.

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19. The legislative history of § 1988 supports our conclusion. *Cf.* Senate Report, *supra* note 13, at 4 n.4 ("In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors."); *id.* at 5 ("Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) (a court should still award fees when a defendant voluntarily ceases the unlawful practice after a complaint is filed); *see also Carey, supra* (federal suit dismissed after complaint, answer, and one pretrial conference).

20. We consider the proceedings in the district court and on this appeal as connected to plaintiffs' underlying Title VI claim. Plaintiffs may properly request payment for them.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DURHAM DIVISION

C-83-1239-D

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH AND COMMUNITY COMMITTEE,

Plaintiffs

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION and WILLIAM R. ROBERSON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Defendants

MEMORANDUM OPINION AND ORDER

(Filed November 29, 1984)

WARD, Chief Judge

This is an action to recover attorney's fees incurred in previous administrative and judicial proceedings either between or involving the parties to this action. Before the Court are defendants' Motion to Dismiss (August 8, 1984) for failure to state a claim and for judgment on the pleadings, Fed.R.Civ.P. 12(b) & (c), and plaintiffs' Motion for Summary Judgment (August 8, 1984) pursuant to Rule 56, Fed.R.Civ.P. Inasmuch as matters outside the pleadings were presented and not excluded, the Court will treat and dispose of defendants' Rule 12 motion as one for summary judgment pursuant to Rule 12(b) (6) & (c), Fed.R.Civ.P.

The parties submitted extensive briefs and documentary evidence and were heard in oral argument on November 1, 1984.

FACTS

The plaintiffs are organizations representing residents of Crest Street community, a cohesive, predominately black, low-income neighborhood in Durham, North Carolina. For quite some time the City of Durham had requested, and defendant North Carolina Department of Transportation (NCDOT) had planned, extension of a highway known as the East-West Freeway through, and with a major interchange in, the midst of the Crest Street community. As proposed by NCDOT in 1976, the highway extension would displace much of the community.

In March 1977, the North Carolina Legal Assistance Program was retained to represent residents of the Crest Street community concerning efforts against the East-West Freeway. In September 1978, plaintiffs Residents of Crest Street Community and Save Our Church and Community Committee, through counsel, filed an Administrative Complaint with the United States Department of Transportation (USDOT) seeking an investigation of the practices of NCDOT and the Federal Highway Administration for compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 49 C.F.R. §21.[1] Title VI provides:

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[1]In addition to alleging that the freeway proposal was violative of Title VI, the Administrative Complaint also challenged the proposal under provisions of the National Environmental Policy Act, 42 U.S.C. § 4331, the Federal-Aid Highway Act, 23 U.S.C. § 109, and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. § 3601.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Part 21 of the Code of Federal Regulations was promulgated to effectuate the provisions of Title VI in any program or activity receiving federal money from the USDOT. 49 C.F.R. § 21.1. The Administrative Complaint sought prohibition of further planning or construction of the freeway by NCDOT and rejection by USDOT of the NCDOT Enviromental Impact Statement until the freeway project was brought into compliance with applicable laws. Affidavit of Willie Patterson, Exhibit A (August 8, 1984).

USDOT conducted a field investigation into the freeway proposals and the allegations of the Administrative Complaint. On February 20, 1980, the USDOT Director of the Office of Civil Rights informed NCDOT of its preliminary judgment finding reasonable cause to believe that construction according to the NCDOT proposal would constitute a prima facie violation of Title VI, in particular, section 21.5(b)(3), 49 C.F.R., which provides:

> In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act of this part.

Patterson Affidavit, Exhibit B. This belief led the complainants, NCDOT, and the City of Durham into extensive negotiations towards conciliation of their differences.

In February 1982, plaintiff Crest Street Community Council, Inc. (Council), the City of Durham, and NCDOT reached a preliminary agreement for the freeway design, relocation assistance benefits, and other assistance in mitigation of the construction. Negotiations for a final mitigation plan toward ultimate resolution of all issues raised by the Administrative Complaint continued.

In August 1982, NCDOT moved to dissolve a 1973 injunction in *ECOS, Inc. v. Brinegar*, C-352-D-72 (M.D.N.C. February 20, 1973), which had enjoined construction of the freeway.[2] The Council and Willie Patterson, a resident of the Crest Street community, moved to intervene in *ECOS* on October 15, 1982. Patterson Affidavit, Exhibit C. The intervention motion was never ruled on, but the applicants for intervention were parties to a December 14, 1982 Consent Judgment dissolving the injunction and dismissing the *ECOS* action. The Consent Judgment provided, *inter alia*, that the state highway defendants and applicants for intervention had

> resolved the things and matters in controversy between them by agreement adopted by the North Carolina Board of Transportation on November 19, 1982.

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[2]Plaintiffs in the *ECOS* action were ECOS, Inc. (a nonprofit, educational, ecological corporation), an association of Duke University students and some of its members, and two Durham residents. The defendants were state and federal transportation officials and a construction company. The action had alleged violations of the public hearing requirement and the preservation of parkland requirements of the Federal-Aid Highway Act, 23 U.S.C. §§ 128 & 138, the parkland preservation policy of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 . The injunction enjoined steps toward construction of a particular section of the proposed freeway until full compliance with the statutes allegedly violated had been achieved.

> The plaintiffs and applicants for intervention do not or no longer oppose the State defendants' motion to dissolve the injunction and do not wish to prosecute this action any further except that the applicants for intervention explicitly reserve the right to pursue all claims in their application for intervention in the event said agreement is not fully implemented, and in addition reserve their claim for attorney fees against the State defendants and the North Carolina Department of Transportation and the plaintiffs reserve their right to pursue all claims relating to the section of expressway proposed to be constructed between U.S. Highway 15-501 and Interstate 85.

Patterson Affidavit, Exhibit F, ¶ 8.

On December 15, 1982, the day following the filing of the Consent Judgment, the Council, NCDOT, and the City of Durham executed the Final Mitigation Plan (Plan). The Plan sets out in a comprehensive fashion efforts to be made by the City and NCDOT to mitigate the detrimental impact of the freeway on the Crest Street community. Plaintiffs contend that under the terms of the Plan, they were accorded very substantial relief.[3] First, a new community site will be developed in the same area and will allow the residents to remain intact as a community. Second, the defendants moved the proposed highway right-of-way and modified an interchange so as to preserve the community church and park. Plaintiffs state that defendants estimated the cost of implementing their major direct responsibilities under the Plan to be $3,072,-

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[3]Apparently, plaintiffs are quite satisfied with the highway plan in its present form for they have, somewhat ironically, intervened in *West Durham Lumber Co. v. North Carolina Department of Transportation*, C-84-234-D (M.D.N.C. July 6, 1984) (action to enjoin construction) on the side of the state, local, and federal defendants in support of the proposed highway.

000. Brief in Support of Plaintiffs' Motion for Summary Judgment at 8 (August 8, 1984).

In August 1983, plaintiffs' counsel sent defendants a request for attorney's fees with a detailed listing of hours, expenses, hourly rates for various personnel, and notice of intent to seek an upward adjustment if court action became necessary. NCDOT denied liability for any fees, and plaintiffs filed this action on November 30, 1983.

DISCUSSION

The Civil Rights Attorney's Fees Award Act of 1976, amending 42 U.S.C. § 1988, in pertinent part provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of [the Education Amendments of 1972] or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

In broad terms, the issue in this case is whether plaintiffs, are prevailing parties within the meaning or scope of section 1988. More specifically, the question before the Court is whether section 1988 authorizes an award of fees for the administrative enforcement of Title VI.

Defendants contend that the plaintiffs are not entitled to relief because (1) the eleventh amendment shields defendants from an award, (2) plaintiffs failed to exhaust administrative remedies, and (3) section 1988 does not support an independent cause of action. The eleventh amendment does not preclude an award under section 1988 which would be paid out of a state treasury. Congress has plenary power to set aside states' immunity from retro-

active relief in order to enforce the fourteenth amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). When Congress passed section 1988, "it undoubtedly intended to . . . authorize fee awards payable by States." *Hutto v. Finney,* 437 U.S. 678, 693-94, 98 S.Ct. 2565, — , 57 L.Ed.2d at 522, 536 (1978). *Hutto* rejects the argument that section 1988 is insufficient to overcome the eleventh amendment immunity. *Maher v. Gagne,* 448 U.S. 122, 131-32, 100 S.Ct. 2570, — , 65 L.Ed.2d 653, 662-63 (1980).

Defendants' suggestion that plaintiffs must administratively exhaust their claim for fees before proceeding in this Court is also without merit. First, Title VI does not require exhaustion. *Chowdhury v. Reading Hospital and Medical Center,* 677 F.2d 317 (3d Cir. 1982), *cert. denied,* -- U.S. —, 103 S.Ct. 786 (1983). Second, the administrative procedures of part 21, 49 C.F.R., for hearings and judicial review are available to *recipients* of federal funds to challenge an adverse decision to cut off funding, not complainants like plaintiffs. And third, under section 1988 only a court, as opposed to an administrative agency, may determine and award fees.[4]

The Court has considered whether this claim for fees should have been brought as a motion in the cause of the *ECOS* action. There is authority that section 1988 does not support an independent action. *E.g., Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983). However, such authority is premised on *Moor v. County of Alameda,* 411 U.S. 693, 98 S.Ct.

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[4]Ironically, an exhaustion of administrative remedies requirement would actually further plaintiffs' fee request rather than bar it as defendants have suggested. *See infra* pp. 11-12.

1785, 36 L.Ed.2d 596 (1973), a case decided prior to the 1976 statutory amendment which authorized attorney's fees.[5] The amending language does not on its face deviate from this holding, but the Supreme Court has recognized that section 1988 raises issues "uniquely separable" and "collateral" to the main cause of action, and that flexibility in the manner of pursuing section 1988 fees exists. *White v. Department of Employment Security,* 455 U.S. 445, 451-52, 102 S.Ct. 1162, —, 71 L.Ed.2d 325, 331 (1982) (Rule 59(e), Fed.R.Civ.P., does not apply to postjudgment fee requests, and district courts may adopt local rules establishing timeliness standards for the filing of attorney's fees claims).[6]

Plaintiffs never formally intervened in *ECOS.* During oral argument counsel stated that the presiding judge in *ECOS* did not rule on any matter concerning their claims and, therefore, would not be in a position of familiarity with the efforts for which plaintiffs now seek fees. The overwhelming majority of the fees sought were incurred in the context of the administrative proceedings or pursuant to the USDOT findings. While the Court may ultimately conclude that the fees are not recoverable because they were not incurred in the context of a judicial

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[5]In *Moor v. County of Alameda,* the Supreme Court ruled that section 1988, then free from any attorney's fee provision, does not create an action but only compliments various federal civil rights causes of action by authorizing federal courts to look to principles of state law when the federal law is unsuited or insufficient to furnish suitable remedies. 411 U.S. at 702-03, 93 S.Ct. at —, 36 L.Ed.2d at 606.

[6]Local Rule 210, effective January 1, 1985, provides that the parties to an action shall attempt to agree on a statutory attorney's fees award, and if they are unable to agree may move within 90 days of final judgment that the Court enter an award.

proceeding, to dismiss the case merely because of its nature as an action instituted independent of prior proceedings would without justification evade the real issue at hand—the propriety of awarding fees under section 1988 for Title VI administrative proceedings.

Plaintiffs' fee request spans five years and eight months, from March 1977 to December 1982, and totals 1,261.25 hours. All but thirty-seven hours, or approximately three percent of the total request, were incurred prior to the motion to intervene filed in *ECOS*. Counsel documented seven hours in preparation of the intervention motion and proposed complaint and two and one-half hours preparing the Consent Judgment. The remaining twenty-seven and one-half hours involved negotiations towards, and review of, the Final Mitigation Plan. Plaintiffs contend that the fees incurred prior to the intervention motion are compensable irrespective of the recoverability of fees for administrative work because the vast majority of counsel's efforts were necessary for the *ECOS* proceeding notwithstanding the existence of a prior administrative proceeding. The Court cannot accept this contention. The motion for intervention and proposed complaint are short and uncomplicated pleadings. Plaintiffs' motion for intervention was never tested and except for the Consent Judgment, they had no other participation in *ECOS*. It is true that the intervening twenty-seven and one-half hours of negotiations and review of the Plan would have been much greater had not the administrative matters preceded. However, to retroactively declare that efforts done over a five year period would have been required in the course of litigation later initiated would result in a highly speculative, uncertain, and unfairly surprising award of fees. Thus, the fee request for 1,224.25 hours

incurred prior to any action by plaintiffs in a judicial forum may not be piggy-backed onto the *ECOS* related hours but may be granted only to the extent, if any, that section 1988 applies to administrative proceedings.

This is a question not yet answered by the United States Supreme Court or the Court of Appeals for the Fourth Circuit. *See Cain v. Virginia,* 582 F.Supp. 531 (W.D. Va. 1984) (Fourth Circuit has not decided whether section 1988 permits fees in optional administrative hearings or prior state judicial proceedings not an integral part of the federal remedy). There is, however, persuasive authority from other circuit courts of appeals holding that section 1988 does not authorize fees for actions or proceedings other than judicial in nature. *Webb v. Board of Education,* 715 F.2d 154 (6th Cir. 1983), *cert. granted,* — U.S. —, 80 L.Ed.2d 456 (1984); *Latino Project, Inc. v. City of Camden,* 701 F.2d 262 (3d Cir. 1983); *Reed v. Lambert,* 674 F.2d 1032 (5th Cir. 1982); *Blow v. Lascaris,* 668 F.2d 670, 671 (2d Cir.), *cert. denied,* 459 U.S. 914 (1982).

In *Latino Project, Inc. v. City of Camden,* 701 F.2d 262, the plaintiff filed an administrative complaint with the Department of Housing and Development (HUD) challenging the use of federal housing funds under Title VI. HUD did not find a violation but the defendant later revised its housing proposals in such a way which led the plaintiff to believe it had prevailed in the administrative Title VI efforts. As a result, it filed a section 1988 action without having filed a complaint on the merits.

The Third Circuit began its review of the case, as this Court must, with the words of the statute[7] and found the phrase "civil action or proceeding" subject to different interpretations.

> Despite the literal ambiguity of the words "civil action or proceeding", the statutory context of those words indicates that Congress intended section 1988 to authorize an award of attorney's fees only to a party who substantially prevails on a civil rights claim in a lawsuit. Specifically, section 1988 provides that "in any civil action or proceeding . . . the *court* . . . may allow reasonable attorney's fees." (emphasis added). Congress' use of the term "court" within the same sentence that contains the words "civil action or proceeding" leads us to believe that Congress had in mind only a lawsuit when it used those words.

Latino Project, Inc. v. City of Camden, 701 F.2d at 264.

The Supreme Court has examined identical language from the attorney's fee provision of Title VII, 42 U.S.C. § 2000e-5(k), in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980), and found that "proceeding" included state administrative and judicial proceedings.[8] Plaintiffs contend that *Carey*

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[7]The starting point for interpreting a statute is the language of the statute itself. *Consumer Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 1051, —, 64 L.Ed.2d 766, 772 (1980).

[8]Fees for federal administrative proceedings under Title VII, such as those before the EEOC, were not at issue in *Carey*, but the Supreme Court noted that several Courts of Appeals, including the Fourth Circuit in *Johnson v. United States*, 554 F.2d 632 (4th Cir. 1977), had upheld awards for work done in required administrative proceedings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 62 n.2, 100 S.Ct. at —, 64 L.Ed.2d at 733 n.2.

is precedent for adopting an identical interpretation under section 1988. There are, however, reasonable grounds upon which to distinguish the *Carey* holding from section 1988. *Carey* was not decided solely on an interpretation of the phrase "civil action or proceeding." The Supreme Court was persuaded only after examining the history of section 2000e-5(k), 42 U.S.C., other provisions of Title VII, and the nature of the congressionally mandated enforcement mechanism of Title VII. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 61-62, 64 L.Ed.2d at 732-33; *see Webb v. Board of Education*, 715 F.2d 254 (*Carey* does not control issue under section 1988; "action or proceeding" is ambiguous).

The legislative history also invites differing analyses. As stated by the Senate Committee on the Judiciary, the purpose of section 1988 "is to remedy anomalous gaps in our civil rights laws created by . . . *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 [95 S.Ct. 1612, 44 L.Ed.2d 141](1975) and to achieve consistency in our civil rights laws," and "it is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 4 *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909, 5912. However, the same Senate Report more strongly supports the opposite conclusion because the notion that attorney's fees are available for services rendered *in court* permeates the legisla-

tive history.[9] *Webb v. Board of Education,* 715 F.2d at 258; *Latino Project, Inc. v. City of Camden,* 701 F.2d at 264; *Blow v. Lascaris,* 668 F.2d at 671.

Title VII requires that claimants timely seek pre-litigation administrative relief either from authorized state or local agencies or from the EEOC. 42 U.S.C. § 2000e-5(c) & (e). In contrast, neither Title VI nor any of the other laws encompassed by section 1988 require exhaustion of administrative remedies. *Webb v. Board of Education,* 715 F.2d at 257. While administrative remedies are available under Title VI, unlike Title VII there is no congressional policy favoring exhaustion of any of the laws listed in section 1988. This is a critical distinction between *Carey* and the instant case and justifies limiting the effect of *Carey* to its facts.

Plaintiffs argue that denial of fees for administrative proceedings will render such proceedings obsolete. Given attorneys' obligation to serve the best interests of their clients, proceedings such as those invoked here surely would not become things of the past. Moreover, issues in litigation which are suited for administrative resolution may be directed to an administrative agency by a presid-

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[9]For example,

> [Section 1988] is designed to allow courts the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts. . . . In many cases arising under our civil rights laws, the citizen who must sue has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights . . . [they] must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909-10.

ing court. *See NAACP v. Wilmington Medical Center, Inc.,* 689 F.2d 1161, 1163 (3d Cir. 1982), *cert. denied,* — U.S. —, 75 L.Ed.2d 390 (1983) (district court temporarily stayed action and ordered HEW investigation). On the other hand, construction of section 1988 to include fees for administrative related events could open the door to fee requests for an array of nonjudicial proceedings which are not required or are not integral parts of one's federal court remedy. Administrative proceedings under Title VI and Title IX of the Education Amendments of 1972, which prohibit discrimination by recipients of federal funding, seem particularly unsuited for an award of fees because individuals, beyond filing an administrative complaint, have little input or control into the decisional process. This puts them at a disadvantage and likewise would make a subsequent court decision of reasonable fees, for matters which by regulation are principally between the federal government and the funding recipient, much more difficult. All things considered, while section 1988 was patterned after the counsel fee provisions of Title VII[10] and uses the familiar "courts or proceedings" phrase, its application cannot mirror Title VII because the rights accorded by Titles VI and VII are remedied in significantly different manners. The Court will, therefore, follow the persuasive authority of those appellate courts which have concluded that section 1988 does not authorize a fee award for work done in conjunction with

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[10]The Court recognizes that the standards for awarding fees under section 1988 are to be generally the same as in these model statutes. *Hensley v. Eckerhart,* — U.S. —, 103 S.Ct. —, 76 L.Ed.2d 40, 50 n.7 (1983). However, the "standards" for fees refers the interpretation of who is a "prevailing party," not where their prevalence is entitled to statutory fees.

administrative proceedings.[11] "[A] plaintiff who has not filed a civil complaint on the merits of a claim under one of the civil rights statutes enumerated in . . . section 1988 is not entitled to attorney's fees . . . even though he may have obtained substantial relief in administrative proceedings." *Latino Project, Inc. v. City of Camden,* 701 F.2d at 265.

Plaintiffs argue that because in September 1978 when they filed their administrative complaint "several courts" had held that administrative exhaustion was a prerequisite to a Title VI lawsuit, it was reasonable for them to believe that an administrative complaint was mandatory. In *Cain v. Virginia,* 582 F.Supp. 531 (W.D. Va. 1984), fees for state administrative and judicial work were allowed because of a federal district court decision that an employee allegedly denied due process must appeal an arbitration decision to state court before starting a federal court action. The pendency of that ruling justified the *Cain* plaintiff's state court actions even though the district court decision was later reversed. Counsel does not suggest that he made a calculated decision to file an administrative complaint rather than institute a lawsuit after having considered the optional or mandatory nature of part 21,

[11]Plaintiff cites three cases which if followed would lead to a contrary result. One, *NAACP v. Wilmington Medical Center,* 689 F.2d 1161 (3d Cir. 1982), *cert. denied,* — U.S. —, 75 L.Ed.2d 390 (1983), was specifically rejected in *Latino Project, Inc.,* a subsequent Third Circuit case, as standing for the proposition that "action or proceeding" included administrative proceedings. The other two, *Ciechon v. City of Chicago,* 686 F.2d 511 (7th Cir. 1982) and *Brown v. Vathke,* 568 F.2d 634 (8th Cir. 1978) are rejected because they ruled without addressing the crucial optional/mandatory distinction between Title VII and the laws encompassed by section 1988.

49 C.F.R. The Court recognizes that in September 1978, there was authority holding that exhaustion was necessary under Title VI. *Santiago v. City of Philadelphia,* 435 F. Supp. 136, 158 (E.D. Pa. 1977); *NAACP v. Wilmington Medical Center,* 426 F.Supp. 919 (D. Del. 1977), *rev'd,* 599 F.2d 1247 (3d Cir. 1979). However, it is well settled that the doctrine of exhaustion of administrative remedies does not apply where the particular agency lacks procedure for complainants to trigger and participate in the administrative process. *Rosado v. Wyman,* 397 U.S. 397, 406, 90 S.Ct. 1207, —, 25 L.Ed.2d 442, 452 (1970). While one *may,* as the Council did in 1978, file a complaint with the USDOT, filing does not initiate an adversary type proceeding involving the complainant nor is there any remedial provision for the complainant. 21 C.F.R. § 21.11. From that point forward, the complainant is not a mandatory party to the USDOT investigation nor to any action or inaction taken with respect to the recipient of federal funds. The Supreme Court recognized the shortcomings of such an administrative format in *Cannon v. University of Chicago,* 441 U.S. 677, 706-07 n.41, 99 S.Ct. 1946, —, 60 L.Ed.2d 560, 581-82 n.41 (1979), noting that exhaustion under Title IX is not appropriate because, as in Title VI, a complainant is not assured an investigation on the merits, participation in any investigation, or relief even if the government finds a violation. The permissive and limited nature of a complainant's role in the administrative enforcement mechanism illustrates, as it did in 1978,[12] that exhaustion is not required under Title VI.

[12]The regulations in effect in 1978 are not different in any manner relevant here from those currently in effect. 49 C.F.R. § 21 (1978).

Even though the Court finds that the administratively initiated work is not compensable under section 1988, the question remains whether any of the ECOS related work is compensable. A prevailing party is one who succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit, *Hensley v. Eckerhart,* — U.S. —, 103 S.Ct. —, 76 L.Ed.2d 40, 50 (1983), and a consent judgment short of final adjudication may support an award of fees. *DeMier v. Gondles,* 676 F.2d 92, 93 (4th Cir. 1982). In such circumstances,

> the court must focus on the condition that the fee claimant sought to change so as to gain a benefit or be relieved of a burden. With this condition as a benchmark, the inquiry then becomes "whether, as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition."

DeMier v. Gondles, 676 F.2d at 93 (quoting *Bonnes v. Long,* 599 F.2d 1316, 1319 (4th Cir. 1979), *cert. denied,* 455 U.S. 961 (1982)).

Plaintiffs did not initiate the *ECOS* action and they were never allowed to intervene. Through intervention, they sought (1) an injunction prohibiting extension of the highway and (2) declaration that the defendants' practices violated Title VI and other laws. Patterson Affidavit, Exhibit C. They obtained neither. Furthermore, even if plaintiffs had been allowed to intervene, their opposition to dissolution of the injunction would not be entitled to fees because the ECOS injunction had only prohibited construction pending compliance with laws *other than Title VI.* The proposed highway was never judicially

enjoined, at the behest of plaintiffs or anyone, on the ground that it would violate Title VI.

Although not set forth in the intervention motion and proposed complaint, it is obvious that the purpose of the attempted intervention was to prompt speedy execution of the Final Mitigation Plan. The Plan was executed the day following the Consent Judgment; however, the Consent Judgment recites that the state defendants and applicants for intervention had already resolved their differences by agreement adopted November 19, 1982. As a practical matter, there is no evidence that the *ECOS* fee efforts, limited to seven hours of preparing the intervention motion and two and one-half hours for drafting the Consent Judgment, significantly contributed to the execution of the Plan. The twenty-seven and one-half hours of final negotiations between these two events were preceded by many months and numerous hours of serious negotiations following the USDOT prima facie finding of a Title VI violation. Plaintiffs do not suggest that resolution of final details had become uncertain. Final settlement seemed imminent. Plaintiffs have not shown that their "participation" in *ECOS,* an action to which they were not parties, was even a catalyst to the Plan.

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CONCLUSION

The issue presented by this case is a difficult one. Without question the plaintiffs' interests were well served by their counsel. Yet, the general rule in this country in the absence of specific legislative authority is that litigants bear their own costs. The argument that section 1988 is

authority for fees incurred administratively as well as judicially is not an unreasonable one. However, in the absence of persuasive direction from Congress or controlling judicial authority and considering the nature of remedies afforded by Title VI and the other laws encompassed by section 1988, the Court concludes that the argument must fail.

IT IS, THEREFORE, ORDERED that defendants' motion to dismiss or for judgment on the pleadings be, and the same hereby is, GRANTED, and that plaintiff's motion for summary judgment be, and the same hereby is, DENIED.

A Judgment will be entered accordingly.

/s/ Hiram H. Ward
United States District Judge

November 29, 1984.